

Before the
FEDERAL COMMUNICATIONS COMMISSION **RECEIVED**
 Washington, D.C. 20554

MAY - 7 2003

In the Matter of)

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Alascom, Inc. Request for)

) WC Docket No. 03-18

Waiver of Commission Rule)

And Orders Requiring Annual)

Tariff Revision)

MOTION TO DISMISS AND
COMMENTS OF ALASCOM, INC.

Alascom, Inc. ("Alascom"), by its attorneys, hereby requests that the Commission dismiss the Motion to Deny Petition for Waiver dated April 24, 2003 ("Motion to Deny") filed by General Communication, Inc. ("GCI"), against Alascom's January 7, 2003 Petition for Waiver ("Waiver Petition").¹ As shown below, GCI's Motion to Deny is an unauthorized repetition of the February 5, 2003 "General Communication, Inc. Opposition to Petition for Waiver" ("Opposition") also filed in the instant proceeding.

I. The Motion to Deny is an Unauthorized Filing that GCI Admits is Duplicative of its Earlier Opposition.

In the Waiver Petition, Alascom requests a waiver of the relevant Commission rule and orders to permit it to forego filing its 2003 rate revisions to its Tariff No. 11 based upon many factors, including: failure of necessary 2002 data collection (Waiver Petition, p. 11; Initial Declaration, p. 3-4), erosion due to the passage of time in the integrity of the Cost Allocation Plan ("CAP") model necessary

¹ The Waiver Petition was supported by expert testimony: Declaration of John C. Klick and Julie A. Murphy ("Initial Declaration").

for production of Tariff No. 11 rates (Waiver Petition, pp. 10-11; Declaration, 5-8), and a Bureau decision² which improperly, partially undermined the CAP's functioning (Waiver Petition, p. 4).

The Commission issued public notice of the Waiver Petition and invited comments by February 5, 2003,³ to which GCI timely filed its Opposition. GCI filed its Motion to Deny approximately seven weeks after it had an express right to do so, in duplication of its Opposition.

GCI admits in its Motion to Deny:

GCI filed lengthy opposition to the Alascom Waiver, providing ample grounds to deny the Petition... (Petition to Deny, p. 8, n. 21)

Alascom disputes the substance of GCI's contentions but it is clear that GCI admits that it previously presented its case for denial of the Waiver Petition. GCI has not even attempted to allege a basis to support acceptance of its Motion to Deny, which violates the public notice that established the pleading cycle in this proceeding. Therefore, the Motion to Deny should be dismissed as an unauthorized filing, a classic "second bite at the apple."

II. Even if Accepted into the Record, the Substance of the Motion to Deny is Repetition.

If the Commission does not dismiss the Motion to Deny, or accepts it as an *ex parte* communication, Alascom submits that GCI's Motion to Deny offers no more than repetition of GCI's previous allegations from its Opposition. For example, it is

² See Alascom's March 15, 1997, Application for Review of the following Bureau decision: *Alascom, Inc., Cost Allocation Plan for the Separation of Bush and Non-Bush Costs*, Memorandum Opinion and Order Approving Cost Allocation Plan, 12 FCC Rcd 1991 (1997).

³ *Pleading Cycle Established for Alascom, Inc. Petition for Waiver of the Commission's Rules Regarding its Annual Tariff F.C.C. No. 11*, DA 03-169 (January 21, 2003).

replete with claims that Alascom "unilaterally" decided to withhold the annual Tariff No. 11 rate revisions and that the CAP is "obsolete" or "suddenly obsolescent." (GCI Application for Review, pp. 4-5) As noted above, the Waiver Petition provided thorough evidence and explanation of the reasons which prevented Alascom from filing 2003 annual revisions to Tariff No. 11.

GCI argues that the Waiver Petition should be denied because it has not obtained access to Alascom's CAP and its underlying data. The question of GCI access to Alascom's confidential information is squarely before the Commission⁴ and there is no final determination that GCI has any right to such data.⁵ Indeed, the Commission twice has determined that those data are confidential.⁶ What GCI does not admit is that it has been provided independent expert testimony about the CAP, its functioning, the data and competitive harm likely to result if the Confidential Information is released to GCI.⁷

GCI does not mention that through discussion of counsel, Alascom offered GCI controlled access to the CAP model for review by its independent experts under a form of protective order. GCI refused that offer during a telephone status

⁴ See *GCI Freedom of Information Act Request*, Control No. 2003-208, filed February 26, 2003; See also Alascom Application for Review filed April 24, 2003.

⁵ *Ibid.*

⁶ *In re General Communication, Inc., on Requests for Inspection of Records*, 11 FCC Rcd. 17143, 17146 (1996) (These documents contain specific cost and demand data that is highly detailed and disaggregated. If this information were disclosed, GCI would know with a high degree of specificity the costs and demand for various sites within the non-Bush areas where GCI competes with Alascom. This information could also be used to determine profit margins when combined with information about Alascom's rates, which is contained in the public tariffs.); *GCI Freedom of Information Act Request, Letter Decision*, Control No. 2003-208 (Wireline Competition Bureau, April 10, 2003) (The Bureau does not question Alascom's claim that the information is confidential, or disturb prior Commission findings that the information is confidential.)

⁷ See Declarations attached to Waiver Petition; Supplement to Waiver Request; Supplement to Response to FOIA Request; Reply to Opposition.

conference before the Commission's staff on March 26, 2003, which demonstrates that GCI has no serious interest in examining the functioning of the CAP. GCI must want use of Alascom's confidential data for its own business purposes.

GCI erroneously alleges that Alascom failed to answer questions posed to it by the Commission's staff. (Motion to Deny, pp. 6-7) In making that claim, GCI ignores Alascom's Supplement⁸ to its Waiver Petition, in which Alascom answered the staff's questions thoroughly, with support of expert testimony:

Access to 1994-1995 data, in combination with publicly available information provided with each of the annual Tariff No. 11 rate revisions from 1995 through 2001, would allow GCI to assess comparative market shares at location-specific levels of detail, and could be used to produce reliable projected estimates of Alascom's costs in the years after 1995. The closer in time the data, the more reliable the projected estimates of Alascom's costs. In addition, if GCI is allowed to compare 1994-1995 inputs with more current ones, GCI could assess how effective its past competitive offerings were in specific geographic areas, and how to shape its future competitive offerings in order to target Alascom's market share in specific geographic areas. Moreover, GCI would have access to the number of private line customers that Alascom has maintained in each of the 33 non-Bush locations. This creates a business opportunity for GCI to gain additional market share by having access to information that its competitor does not have about its customers. See *Alascom Supplemental Response* at p. 6; See also, *Initial FOIA Declaration* at pp 2-3.

To date, GCI has filed an astonishing *eight* submissions in connection with the Waiver Petition.⁹ Despite all of its filings, GCI is suffering no material harm

⁸ Supplement to Waiver Request; Supplement to Response to FOIA Request, filed April 4, 2003.

⁹ Motion to Deny of General Communication, Inc., filed on WC Docket No. 03-18, April 24, 2003; Letter of General Communication, Inc., to Secretary Dortch, transmitting the executed declarations of six GCI persons intended to receive confidential information, filed in WC Docket No. 03-18, April 16, 2003; General Communication, Inc., Response to Supplement to Waiver Request and Supplement to Response to FOIA Request, WC Docket No. 03-18, April 9, 2003; Letter of General

because there has been no interruption or alteration in the provision of Tariff No. 11 services, all that has happened is continuation of the 2002 rates.¹⁰ Assuming that GCI pursues rational purposes, its goal likely is to obtain access to Alascom's confidential information for the many anticompetitive reasons that Alascom's experts have identified.

GCI urges that the Commission to require Alascom to file revised 2003 Tariff No. 11 rates and to implement a formal investigation of that tariff immediately. (Motion to Deny, pp. 7-8) While it is correct that Alascom has been collecting traffic information relevant to Tariff No. 11, the infirmities in the rate-making process described in the Waiver Petition remain. (*supra*, pp. 1-2) Accordingly, Alascom has been seeking alternatives to the Tariff No. 11 process. In this regard, a formal investigation would be wasteful of the resources of the Commission and the parties. The controversy here is between two parties and the most efficient approach is to implement a system to replace the CAP process which would be satisfactory to the interests of GCI and Alascom, and approved in the public interest by the Commission. Efforts to resolve these controversies would be undermined by the burdens and distractions of an investigation.

Communication, Inc., to Secretary Dortch transmitting Statement of John Leahy, filed in WC Docket No. 03-18, February 11, 2003; Letter of General Communication, Inc., to Charles R. Naftalin, requesting copies of the CAP Model, filed in WC Docket No. 03-18, February 11, 2003; General Communication, Inc.'s Opposition to Petition for Waiver, filed in WC Docket No. 03-18, February 5, 2003; Letter of General Communication, Inc., to Secretary Dortch, transmitting executed declarations of four persons intended to receive confidential information, filed in WC Docket No. 03-18, January 30, 2003; Letter of General Communication, Inc., to Secretary Dortch, transmitting executed declarations of two persons intended to receive confidential information, filed in WC Docket No. 03-18, January 29, 2003.

¹⁰ As GCI noted, the Commission has made all Tariff No. 11 charges subject to an accounting order (Motion to Deny, pp. 2-3) so that in the unlikely event that those rates are determined to be unlawfully high, GCI would be made whole.

Therefore, based on the foregoing, the GCI Motion to Deny should be denied.

Respectfully submitted,

ALASCOM, INC.

By 
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May 7, 2003

CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the firm of Holland & Knight LLP, hereby certify that on the 7th day of May, 2003, copies of the foregoing Motion to Dismiss and Comments of Alascom, Inc. were sent by electronic mail to the following:


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FCC 162 Approved by OMB
April 2000 3060-0919

Federal Communications Commission
Commission Registration System (CORES)
CORES Certification Form

I, Judy Norris, certify that the FCC Registration Number (FRN) listed
below is true and correct to the best of my knowledge, information and belief.

FCC Registration Number (FRN)

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